No. 3205

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

TWENTY ONE MINING COMPANY
(a corporation),
Appellant,

vs.

ORIGINAL SIXTEEN TO ONE MINE, INC.
(a corporation),
Appellee.

REPLY BRIEF FOR APPELLANT.

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PERNAU-WALSH PRINTING CO.

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Lest some confusion may exist in the mind of the court as to our positions on certain questions argued by appellee, we make the following statement:

1. AS TO THE QUESTION OF NECESSITY.

This question cannot arise, unless this court is of the opinion that the right claimed by appellee to go outside of the walls of the vein, is given by Section 2322, R. S. U. S., or by implication therefrom. Then if it has such right, it can only be exercised in case of reasonable necessity.

2. AS TO THE WORK DONE BY APPELLEE OUTSIDE THE VEIN PRIOR TO THE INSTITUTION OF THIS SUIT.

The court inquired at the hearing, whether this work was involved in this action, and we feel that in fairness to the court, the bearing of such work on the questions involved, should be explained.

Appellant filed its verified complaint herein, for the purpose of procuring a preliminary injunction, and supported the application by the affidavit of Mr. F. L. Sizer. It was deemed proper that it should contain a statement concerning certain work which appellee had theretofore done outside the vein, and the position appellee had taken with reference to its right to do the same work *solely for the purpose of presenting to the court, the proposition that if appellee had theretofore been working outside the vein under a claim of right,* it would be fair to presume that it would continue the same class of work in the future.

By the affidavits filed by appellee in response to the order to show cause, and by the verified answer of appellee, this former work was admitted to have been done, and it is claimed that appellee did the same rightfully. Appellant asks no relief in this action with reference to the former work. Appellee however, has continuously asserted that this work was done by it in the exercise of a right which it had by virtue of the ownership of the vein, and it would seem from the argument of counsel and their brief, that it is sought to have this court determine

in this action whether or not such work was rightfully done. We insist that such question is not involved in this action. If the appellee did the work under a claim of right, would it not probably continue to do the same class of work in the future? This is the only question involved in relation thereto.

It was impossible in our original brief to anticipate what defense counsel for appellee might present to our positions. We shall therefore as briefly as possible reply to appellee's brief:

I.

Proposition I (brief, page 11) states simply the provisions of the statute.

We insist that the exclusive possession and enjoyment therein provided for can only extend *so far as granted by and specified in Section 2322.* The court cannot add by construction, any additional rights, benefits or privileges.

We have no quarrel with the principles announced in the cases cited by counsel on this point. They are general in their character, and simply go to show that the vein extralaterally is property; a part of the location in which the apex may be found, and that the owner of the location is entitled to the vein to its uttermost depth. We do not contest any principle decided in these cases, but insist that the rules which they announced apply only to the rights plainly given by Section 2322.

Counsel says that:

> "The general principles enunciated by these cases sustain the conclusion that the statute virtually grants to the locator the right to follow the vein extralaterally, and gives him, not only the right of possession, which in many instances, if narrowly and technically confined to the vein itself, would prove a barren and worthless right, but Congress in its wisdom also conferred on the locator the right of enjoyment of the thing of value granted."

We see nothing stated in the cases cited which even tend to substantiate counsel's conclusions. Unquestionably, a locator is entitled to the exclusive possession and enjoyment of the vein extralaterally if such vein can be followed. However, we see nothing in the statute disclosing any intention on the part of Congress to give to a locator anything except the *vein* in the physical condition in which it is found. We insist that the extralateral rights given by the statute are confined to the wording of the statute itself. Whatever is granted therein, passes, and nothing else.

II.

With counsel's assertion that Section 2322 is to be liberally construed (brief, pages 13 et seq.), we agree insofar as the protection of rights specifically granted by the statute are concerned, but we insist that the doctrine of liberal construction can never be utilized for the purpose of extending the terms

of the statute and engrafting thereon property or rights not mentioned therein.

And all the cases cited where courts have determined that a liberal construction should be applied to the mining law, are those which involved questions as to the extralaterial right itself as affected by the form of the location, with reference to the course or length of the apex of the vein within its boundaries. We admit that Section 2322 in that regard should be construed so as to give to the locator everything to which he is entitled under the terms of the statute. As Judge Brewer says in the *Del Monte* case, 171 U. S. 55, such right should be awarded to the locator if it can be done,

> "and only if it can be done under any fair and natural construction of the language of the statute."

When, however, counsel seek to add rights to the statute by construction, we insist that the reason for the use of a liberal construction disappears, and should not be applied.

The application of the most liberal rule of construction never goes to the extent of engrafting anything on the statute, or of extending its terms, or giving rights greater than therein mentioned.

III.

Counsel's third proposition (brief, pages 16 and 17) is

> "that in the interpretation of a statute, the effort of the court always is to carry into effect its manifest purpose."

We concede the correctness of this proposition with some limitations however. The purpose of a statute and the intent of the legislative body in its enactment *must be gathered from the statute itself.* As stated by the court in the case of *U. S. v. Jackson,* 143 Fed. 783 (cited and quoted on page 16 of counsel's brief):

> "This is a congressional act, and must be interpreted according to the *intention of Congress, apparent on its face."** We ask what there is on the face of the Mineral Act which can be claimed to disclose any intent on the part of Congress that any rights should be given by implication?

IV.

Counsel's fourth proposition is that the opinion of this court in the *Drum Lummon* case, (113 Fed. 900) recognizes the necessity of a special right of exploration incident to the right to follow down, in and upon the vein (brief, page 17).

Counsel evidently appreciates the force of that opinion and seeks to sustain the above proposition by asserting that this court *intimated* in said opinion by way of *dictum merely,* that an extralateral proprietor would be "in pursuing and appropriating his vein, confined to work in and upon the vein." He then seeks to place upon the words used

*Italics in this brief are ours.

in that opinion a meaning which he deems satisfactory, in order that he may erect some seeming argument in his own favor. Presumptively, these words were used by this court, in their ordinary sense, and that when the court said that an extralateral proprietor would "in pursuing and appropriating a vein, be confined to work in and upon the vein" it meant exactly what it said.

We firmly believe that this opinion was well considered and only adopted after mature deliberation and the weighing of every sentence and word therein contained.

Counsel states that:

> "It will also be noted that Judge Brewer in that case, distinctly held that the apex proprietor had 'the right to pursue a vein, which on its dip enters the subsurface' of another. He does not confine his right to the vein, which would often result in defeating the entire purpose of the statute."

We submit that Judge Brewer meant exactly what he said, and that his opinion is perfectly clear.

Counsel also endeavor to construe the language of this court to mean that it was intended thereby to give an extralateral proprietor the incidental right of exploring for his vein under the surface of another's land, because this court used the words, "general right of exploration." We can see nothing in this position, and submit that the opinion is clear and unquestionable.

V.

Counsel's proposition V is that the extralateral right grant has the effect of severing the vein from the overlying surface and carries with it all incidental rights reasonably necessary for its full enjoyment (brief, page 20).

We agree that Section 2322, in effect, amounts to a severance of the vein from the location into which it dips, but assert that such severance does not give to the extralateral proprietor any rights not specifically described in the statute.

In support of this proposition, counsel quotes extensively from Judge Lindley's most valuable work on mines. After a statement that the grant of the extralateral right is in legal effect a severance and should be construed liberally, Judge Lindley says:

> "This grant of the fee in the vein *may be accompanied by certain easements.* To illustrate: the right to follow the vein into adjoining lands, frequently, cannot be exercised without disturbing some portion of the enclosing rock."

Judge Lindley exercised his usual caution in the use of language. He makes no positive assertion, ventures no opinion but merely makes a suggestion.

Counsel's conclusions, however, contained in the last paragraph on page 21, and the first paragraph on page 22 in his brief, do not meet with out approval. He says the only difference between the severance of the title of mineral from the land in

which it is contained, at common law, by private grant, and the severance of the vein made by section 2322, is, that in a private grant, the grantee may enter upon the surface, while under section 2322, he is not allowed to do so. He seems to overlook the fact that all private grants are based upon contract, and that section 2322 is not. These matters will be urged by us in another part of this brief to which we hereby refer.

VI.

In proposition VI (brief, page 22) counsel reaches the culmination of his contentions, and states that a grant of the mineral underlying the surface of land owned by another, carries with it by implication, the right to do whatever is reasonably necessary for the beneficial use and enjoyment of such mineral. He then cites and quotes from a large number of cases, everyone of which involved the construction of a *private grant.*

All private grants rest on contract. When one sells and conveys anything and receives a valuable consideration therefor, it should be and is the law, that by his conveyance, he transfers everything which is reasonably necessary to make the grant effective. Otherwise the consideration to the opposing party would fail. The grantor would be getting something for nothing.

The rule as to private grants that everything is implied necessary to render the grant effective, is

based upon the fact, that all things which could pass by implication, are presumed to be in the minds of the parties when they make the contract, and become part of the contract, although not mentioned therein.

Now applying these rules to the Act of Congress: Under the Mining Statute, the government gives permission to locators to go upon the public demain, and by location, conditionally secure the exclusive possession and enjoyment of land containing mineral veins and all veins apexing within his surface boundaries. It would seem impossible that Congress, when it enacted the mining law, had in mind the physical peculiarities of any veins upon the public domain.

When a person goes upon the public domain and discovers and locates a vein, which, upon development, proves to be too small or too crooked to work economically, he is not bound to purchase it, or spend any more time or money on it. He may abandon his location at once. If he has spent time and money upon the property, in order to ascertain the character of the vein, it is lost to him if he abandons his claim, just the same as though the abandonment was because the vein was not sufficiently valuable to warrant work upon it.

When one begins exploration for the vein, he is charged with knowledge as to the extent of the rights which flow from a location, and is bound to know that the entire procedure is more or less

speculative. If he does not desire to "take a chance", he need not spend any time and money in prospecting for a vein and making a location.

We submit, therefore, that the rule of implication applied to private grants cannot on principle or reason, have any applicability to locations made under the Mineral Act.

REASONABLE NECESSITY.

As a part of his proposition No. VI, counsel treats of reasonable necessity on pages 29 and following.

As hereinbefore stated, this question does not arise and cannot be considered, unless the court finds against us on the main contention involved in this case, and we do not care to add anything further.

VII.

Counsel in proposition VII (brief, p. 33) includes general principles involved in granting injunctions of the character of the one demanded. He states:

> "(a) Relative balance of convenience and injury or doctrine of comparative hardships especially applicable to interlocutory proceedings."

We have discussed this proposition in our opening brief, and have but little to add thereto.

Counsel concede that we are right in our position that the court below did not exercise any discretion in arriving at his decision denying the application for an injunction but held as a legal proposition, that plaintiff was not entitled to the relief asked.

We repeat our assertion made in the opening brief (pages 21 et seq.) that the question of comparative convenience or injury is never applicable or considered where the injunction is sought to prevent the unlawful invasion of a right, or where it is granted or refused as a matter of law.

We might admit, for the purpose of argument, that when a lower court exercises a discretion in ruling upon an application for an injunction, he may take into consideration, the balance of convenience and hardship *for the purpose of determining such discretion.* Here it would have made no difference with the court's ruling, if the balance of convenience and hardship had all been in favor of plaintiff.

Again, referring to the recitations in the bill of exceptions found on pages 20 and 21 of our opening brief, we submit that it is conclusive that the question of discretion was not considered by the lower court. His decision was correct or erroneous as a matter of law, and is subject to review by this court, and we claim that we are entitled to the decision of this court as to its correctness.

Counsel further assert:

> "(b) PUBLIC INTEREST DEMANDS A DENIAL OF THE INJUNCTION SOUGHT" (brief, p. 35).

Under this heading, counsel seeks to impress upon the mind of the court that any action on appellant's part which tends to curtail or limit the production of gold is in violation of the proclamation of McAdoo, Secretary of the Treasury of the United States. It would, indeed, be remarkable if this court should sustain such contention, because, forsooth, the Secretary of the Treasury deems it important to the finances of the country that gold mining be continued, as though appellee's particular mine and mining scheme was under the direct supervision of the Government of the United States. It would be belittling the government to even suggest that it cares anything about, or is in anywise interested in the small mining proposition of appellee in Sierra County.

Counsel cites and quotes from the case of *St. Louis Trust Co. v. Galloway Coal Co.,* 193 Fed. 106, and relies upon the proposition therein claimed to be asserted, that the public is interested in all injunctions, apparently as a *quasi* party.

No question of a preliminary injunction appeared in that case. The case was up for final hearing. Plaintiff demanded a forfeiture of the lease in question on the ground that its terms had been breached; that if they were not entitled to the enforcement of a forfeiture for the alleged breaches, they were entitled to an injunction against any future unauthorized use of certain openings in the mine.

It seems that at the same time plaintiff's predecessors in interest gave the lease, the lessees negotiated a lease of the right to remove coal from adjoining lands; that it was understood by all parties that the lands covered by these two leases should be operated as a single mine, each being essential to the other.

One provision of the lease under construction was as follows:

> "Said lessees may use, during the life of this lease, any slopes, headings, entries and passageways, through, over and across the lands included herein, for the purpose of reaching, giving access to, or mining any other lands which they may lease or buy, provided said lands are within 2500 feet of the main slope opened on the lands embraced in this lease."

The fourth ground of forfeiture claimed by plaintiff was a breach of this stipulation. Plaintiff alleged that defendants had been using certain slopes or passageways to transport coal from other lands which were more than 2500 feet from the main slope. The court stated that the defendants had mined coal on Section 6, and that the nearest boundary of such land was more than 2500 feet from the main slope opened on plaintiff's land, and that therefore such use was beyond the terms of the lease.

The court then holds that the reasonable value of such user would be full compensation for the injury, and says:

> "Payment of the sum which would be the reasonable value of the user would entirely compensate plaintiff for all injury suffered from such use. * * * I think no injunction should be granted, at least until the expiration of a sufficient time to complete the mining of that part of the seam from which both benches are mined, provided the period required for so doing is not an unreasonable one."

The court retained the case for the assessment of compensation for past and future unauthorized user of certain narrow work until the court had been furnished sufficient data to determine the reasonable value of such user, and with leave to the plaintiff to renew his application for injunction, either in this or a subsequent proceeding, if such user continued beyond the period indicated.

It is utterly impossible for us to appreciate how anything involved in that case can be considered as having any bearing upon the proposition involved in the instant case. There was a contract for the user of the way in question. Plaintiff alleged that defendant used the way for a purpose beyond the terms of the contract and sought to enjoin such unauthorized user. The court refused to grant such injunction, but provided plaintiff with compensation for such use. No question arose in that case as to the excavation and removing of a part of the substance of the estate, but merely the question of the use of a right of way, which was authorized by the lease, and the use complained

of was claimed to be beyond the terms of the lease. There was no trespass upon, or invasion of the rights of the plaintiff, or possible irreparable injury, as is contemplated here. The reference to the public in this opinion is purely argumentative, and not the statement of any legal conclusion.

Counsel then state:

> "(c) PRACTICAL REASONS ARE OPPOSED TO APPELLEE'S THEORY."

While this subdivision is placed with the proposition of general principles involved in granting injunctions of this character, it is apparent from the argument that this is urged as a reason for the court sustaining appellee's general position.

Counsel in the discussion of this proposition seems to overlook a principle which has been settled for a great many years, and that is that no right can be based upon a tortious invasion of the rights and property of another. The excavating and removing of any part of the subsurface of the locations belonging to plaintiff would be invading its right to have it remain in the place where nature deposited it, and would be destroying the substance of appellant's property.

It is no excuse to say that appellant would not be damaged. Irreparable damages are absolutely presumed from the invasion of a right. The entire effort of counsel seems to belittle the contention of appellant, and to enlarge the great benefit which they argue would accrue to this country by appellee being allowed to trespass upon appellant's ground.

Counsel speaks of the dead loss of capital which would serve no useful end whatever. We suggest that there is no danger of appellee investing any capital in the operation of this vein, unless it can see good returns from such investment. No capital would be lost, because none would be invested.

We cannot concede any materiality in counsel's suggestions relative to additional danger to life and limb from the works which they would have to construct in case appellant's position is right. Under the laws of California, they would be compelled to make such working safe, and although it might cost them a little more, we can see no reason why they should be excused from such investment instead of being allowed to invade our rights and trespass upon our property.

Counsel assume that the result of the construction of Section 2322, as we contend, would reduce it to an absurdity. We might suggest that an equal absurdity would result from the construction claimed by counsel for appellee. By the construction contended for by appellee, a free license would be given to it to go underneath the surface of our premises, and do with it exactly as they pleased, under the pretense that their acts were reasonably necessary to the economical mining of the vein.

We submit that this last subdivision of the brief cannot be considered by the court at all, because as Judge Brewer says, the right claimed by appellee is statutory, and we must look to the statute to determine its existence and extent.

VIII.

GENERAL OBSERVATIONS.

(a) The purpose of appellant in bringing this action.

Apparently, counsel for appellee are not satisfied to rest the validity of their claim upon their legal rights as established by law, but by direct charge and numerous innuendoes, seek to impress upon the mind of the court, that appellant is acting unfairly; that having lost the right to the vein by a decree of the District Court, and the verdict of a jury, they are now seeking to impose upon appellee, such unnatural obstructions as to render its victory in the litigation of no avail. The decisions under which they claim, may be removed to this court for review, and have no finality until after hearing and decision in this court, or the time for removal thereto, has expired.

We contend that if appellant is right in its position, it makes no difference what purpose may have induced it to take steps to protect such rights. Courts are never influenced in deciding legal propositions by the spirit or reason of either party to the suit with reference to the litigation. This is especially true in the consideration of a question like the one at bar, which wholly depends upon the construction of a statute of the United States. If the law is such that appellee's apparent victory can be of no benefit to it, then it should not be heard to complain.

(b) The question of implied easements and implied grants.

Counsel fail to characterize the right claimed —whether a right of way through, or title to the ground required. It seems conceded that whatever the right is, it has not been granted by the statute in express words, but must be implied, as counsel say, "in order to make the grant of the vein effective."

Under the well-known rule of easements, no such right could be granted by implication. In order that an easement pass by implication from a grant of real estate, it must be in existence, and have been theretofore and at the date of the grant, used in connection with the land granted. It cannot thereafter be created or the physical condition of the property changed, in order that it may exist.

An easement by necessity only arises by way of an implied grant, when three certain concurrent conditions exist at the time of its alleged creation, viz: (1) A separation of the title; (2) That before the separation takes place the use which gives rise to the easement shall have been so long continued and so obvious as to show that it was meant to be permanent, and (3) That the easement shall be necessary to the beneficial enjoyment of the land granted *(14 Cyc.* 1168).

It has been held that no easement will be implied from a grant when it becomes necessary to change the physical condition of the property in order to

create the easement *(Roe v. Siddons,* 22 Q. B. D. 224). Here, the way would have to be carved out of the substance of appellant's estate by the extraction and removal of the rock. If the easement has to be created, it cannot be held to have been in contemplation of the parties when the grant is made.

Again, such easements must always exist on and be connected with the surface, and cannot be constructed underground *(Pearne v. Coal Creek Co.,* 18 S. W. 402).

Again, the property necessary to satisfy such claim would be absolutely taken from appellant for all purposes without any compensation, and in violation of the constitution of the United States. Such property is real estate, and can never pass as an easement.

We must, therefore, conclude that the rights claimed cannot pass as an easement by implication from a grant of the vein.

The only remaining theory upon which the right claimed could pass is by grant *which would be equal in dignity to a grant of the vein itself.* It would so far exceed the principles of grants to allow such right to pass by implication as a grant, that further consideration would seem superfluous.

(c) Only a statutory right is involved.

In considering and deciding the question concerning the construction of section 2322, we trust

the court will bear in mind that the right to go outside the vein as claimed by appellee is and can be so claimed only under the provisions of that section, and that all the rights granted by that section are purely statutory.

If the right claimed is not given by this section, it does not exist, no matter what equities exist or be urged by appellee to the contrary.

Judge Brewer in the *Del Monte* case, 171 U. S. 55, in passing upon a question as to whether or not extralateral rights could be claimed on a vein which passed through an endline and sideline of a location, used the following language:

> "We, therefore, turn to the following sections to see what extralateral rights are given, and upon what conditions exercised, and it must be borne in mind in considering the question presented that we are *dealing simply with statutory rights.* There is no showing of any local custom or rules affecting the right defined and prescribed by the statute, *and beyond the terms of the statute courts may not go. They have no power of legislation. They cannot assume the existence of any natural equity, and rule that by reason of such equity, a party may follow a vein into the territory of his neighbor and appropriate it to his own use. If cases arise for which Congress has made no provisions, the courts cannot supply the defect.*"

Judge Brewer further says that in determining rights under this section,

> "the question in the courts is, not what is equity, but what saith the statute."

(d) Appellant is entitled to a preliminary injunction under all circumstances.

The ultimate object of a preliminary injunction, preventative in its nature, is the preservation of the property or rights in controversy until the decision of the case on final hearing. It does not, in any legal sense, finally conclude the rights of the parties. Its sole object is the protection of the property, or the maintenance of the *status quo* until final hearing. It prevents a multiplicity of actions by the applicant, and protects its rights so as to avoid any thereof being gained by appellee under the doctrine of prescription.

If by chance this court should be of the opinion that appellee has the right to go outside the vein then the question arises whether under the record herein it has shown any reasonable necessity so to do. We do not care to take up the time of the court in making further argument on the showing made, but we insist that from the Answer and the various affidavits filed by appellee it has made no showing that it will be reasonably necessary in the conduct of its mining operations on the vein extralaterally to go outside the boundaries of the vein. Allowing the most liberal construction of its showing, we submit that it only amounts to a claim on appellee's part that the act of going outside the boundaries of the vein will simply render its mining proposition more profitable and economical.

If there was any way in which the court could define and limit the places in which and the extent to which appellee might go outside the vein on the ground of reasonable necessity, their position in regard thereto would be more equitable. In my judgment, even though the court should hold that appellee is given the right to go outside the vein, the injunction should be granted with leave to the appellee to apply to the court whenever it desired to exercise that right, and ask for a modification of the injunction. Thus, each and every time the right would be sought to be exercised it would be under the direct control of the court.

Dated, San Francisco,
November 6, 1918.

Respectfully submitted,

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